Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 79-1854

CARL R. LANGE, RUBY J. LANGE, his wife, and LITMAR, INC., a Washington Corporation,

Petitioners,

v.

THE NATURE CONSERVANCY, INC., a foreign corporation; COUNTY OF SAN JUAN; LINDA HENRY, DONALD WHITMILL and PATRICK ROE, individually and as County Commissioners of San Juan County; ROBERT McABEE, individually and as Director, San Juan County Planning Department; KENNETH R. MARGOLIS; and SPENCER B. BEEBE

Respondents,

and

STERLING MILLER; SASHA LEEPER; LISA PETERFREUND; LINDA MORRISON; and JOHN DOES ONE through SIX,

Defendants.

BRIEF OPPOSING PETITION FOR CERTIORARI

Stimson Bullitt
Attorney for Respondents
The Nature Conservancy, Inc.
Kenneth R. Margolis, Spencer B.
Beebe and Linda Henry, Individually
4300 Seattle-First National Bank Bldg.
Seattle, Washington 98154
(206) 624-3600

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QUESTIONS PRESENTED

1. Whether the Washington State Courts, in entering summary judgment, denied Petitioners a jury trial in violation of the U.S. Constitution, 7th Amendment (Petit., 5, 57).

2. Whether the Washington State Courts erroneously entered summary judgment in disregard of material issues of disputed fact.

3. Whether the Petitioners were denied substantive due process under the U.S. Constitution, 5th and 14th Amendments, by inverse condemnation, when respondent San Juan County accepted the land Inventory, that included Petitioners' island in it, from respondent The Nature Conservancy, Inc., which had compiled the Inventory.

4. Whether the Petitioners were denied procedural due process in violation

of the U.S. Constitution, 14th Amendment, and 42 U.S. §1983 by respondents' failure to allow Petitioners to participate in the process by which respondent County accepted the land Inventory as a document for use in its land use policies.

5. Whether respondents denied Petitioners equal protection of the laws in violation of 42 U.S.C. §§1985(3) and 1986.

6. Whether the Washington State Courts had authority under 42 U.S.C. §1988 to award attorneys' fees to respondents as the "prevailing parties."

REASONS FOR DENYING THE WRIT

1. Denial of Right to Jury Trial—7th Amendment.

(a) The summary judgment was based on a determination of no issues of material fact, and (b) this proceeding was in state court.

2. Alleged Disregard of Issues of Material Fact.

This set of alleged errors may be properly considered only if the Court chooses to review the Washington Courts' assessment of the factual statements in the record and to determine whether (a) material issues of disputed fact were disregarded and (b) whether this disregard denied Petitioners' rights under the U.S. Constitution or U.S. statutes.

3. Claim of Inverse Condemnation—5th and 14th Amendments.

The Inventory of Natural Areas on Private Lands (Petit., Appendix A-8, A-54), compiled by respondent The Nature Conservancy, Inc., listed 57 parcels of land in the County, one of them Petitioners' island. Petitioners allege (Petit., 34, 36-37, 55-57) that the effect of the Inventory, through combination with the County government, was

to "down zone" the Petitioners' land, thereby constituting a "taking."

The Petition (p. 32) asserts that the County adopted the Inventory as land use policy by putting its recommendations into the County's Shoreline Master Program. However, this Program never entered the court record in this proceeding. (See Respondents' Brief, p. 14-15, Washington State Court of Appeals).

The record shows no causal connection between state action and any loss of property rights to Petitioners. The record (Petit., App. A-55) shows that San Juan County did not adopt or establish the Inventory or its contents as County land use policy and that the County used the Inventory only as a reference or resource document, an advisory source for considering future land use policies (Clerks Papers 235). The record does not show that the County has

adopted any land use policies (whether influenced by the Inventory or from any other source) that might impair Petitioners' use of their land.

The record contains no information about Petitioner's land value—either before the alleged injury or after, only the assertion that the value has dropped (Petit., App. A-13, 15). This may be an economic misfortune, but in itself is not a legal injury. The record does show (Lange Dep. 80), that the valuation of Petitioners' land for real estate taxes has not been lowered.

Even if San Juan County had adopted a land use policy that had restricted Petitioners' rights to use their land, such action would not in itself constitute a constitutional taking unless (and the record here does not show this) the restriction was "not reasonably necessary to the effectuation of a substantial public purpose

[citations omitted] or perhaps if it has an unduly harsh impact upon the owners' use of the property." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127; 57 L. Ed. 2d 631, 650; 98 S. Ct. 2646 (1978). And cf. John R. Carlson v. United States, 556 F.2d 489, 214 Ct. Cl. 1 (1977).

4. Alleged Denial of Procedural Due Process by Violation of 42 U.S.C. §1983.

Petitioners claim (Petit. 65) that the Civil Rights Act of 1871 is violated by a county that decides to gather information without first holding a public hearing on the question whether so to decide.

The Inventory was what might be called an "environmental opportunity statement." Petitioners appear to contend that procedural due process for potentially affected parties requires that a decision to permit such a study be preceded by public hearings and, in

effect, making an environmental impact statement (EIS). But an EIS itself is a form of study, so to require an EIS as a condition of making a study would mean requiring an EIS as a condition of an EIS—an unbreakable circle.

5. Alleged Denial of Equal Protection By Conspiracy that Violated 42 U.S.C. §1985(3) and §1986.

a. Claim.

Petitioners claim (Petit. 59 and 70-73) that the respondents combined to subtract from Petitioners' bundle of property rights by making Petitioners' island and reef a kind of public park, to keep it in its pristine state of nature, worthless on the real estate market, and to do this without paying for it.

b. Only an Open and Legal Relationship.

But no facts are shown either that Petitioners' property rights

have been taken or that there have been conspiratorial acts toward that end. The record shows no relationship between The Nature Conservancy and the County other than an open and legal one. Even if abdication were regarded, as Petitioners claim (Petit. 59, 70, 72), as constituting conspiracy, the record contains no facts showing that the County abdicated its function to The Nature Conservancy.

c. Owner's Opinion Evidence— Value But Not Conspiracy.

In his role as an owner, Petitioner Lange may be qualified to state his opinion of the value of his land. But he is not qualified to give as evidence his opinion that the value has been depressed by a conspiracy. Anyone could bring a case to trial if he could make a material issue of fact by his opinion testimony on conclusionary facts that he had pleaded.

d. Conspiracy Inferred Backward, From Alleged County Policy to Inventory.

According to the facts in the record, the County did not adopt the Inventory as county policy. However, Petitioners nonetheless claim that the County has adopted it (Petit. 30-32, 72) and Petitioners then infer a prior conspiracy from the claimed fact of later adoption.

As to reason, Petitioners' thinking recognizes that causality seems to run the world, and that causes bump each other in time sequence, so any event is preceded by a chain of prior causes. So far so good. But petitioners then take a leap not of reason but of faith, in the maxim of post hoc ergo propter hoc, a proposition that is not made true by its statement in an ancient language. The error, of course, is to select from among the infinite number of

prior events one event and attribute it to today's event simply on the basis of its priority in time.

Just because the County may have adopted land use restrictions after The Nature Conservancy impliedly suggested them in its Inventory study does not show that the former caused the latter, and improperly caused at that.

Using the same reasoning, arbitrarily selecting a prior event for attribution, one could attribute this lawsuit to a propensity to litigate. Although the Inventory contained 57 parcels and covered over 12,000 acres, only Petitioners claimed that respondents had oppressed them, and appellant Lange is a veteran litigant, even an inveterate litigant, admitting (Clerk's Papers 328) that this is his 14th lawsuit in Washington State Superior Court, all but one involving land use.

Petitioners' selective attribution fails in law as well as in reason. They

argue that where conspiracy is charged and the facts could indicate either conspiracy or a lawful purpose, the rule that the non-moving party's case is to be interpreted in the most favorable light must turn the compass needle to the interpretation of conspiracy and thereby create a material issue of fact. However, according to O'Brien v. Larson, 11 Wn. App. 52, 55-56, 521 P.2d 228 (1974), to show conspiracy by circumstantial evidence, the facts must be inconsistent with a lawful purpose. That case concerned dismissal at the close of plaintiff's case rather than summary judgment, but the "most favorable light" rule seems to be the same for each form of decision.

e. Burdensome Regulations Do Not Show Conspiracy.

Petitioners have made the analogy of themselves as Gulliver, bound by threads of a government web. Now, the claim

that individual freedom is being narrowed by government regulations is a legitimate argument, but even if the argument were true and not just legitimate, and even if the record showed government restrictions imposed on Petitioners—which it does not—it does not follow that such general restrictions are owing to a conspiracy.

6. Authority to Award Defendants Attorneys' Fees Under 42 U.S.C. §1988

a. The Washington State Courts Had Authority to Apply §1988.

State courts have awarded attorneys' fees under §1988. Board of Trustees, Etc. v. Holso, 584 P.2d 1009, 1019 (Wyo. 1978) and Ashley v. Curtis, 413 N.Y.S.2d 528, 529, 67 A.D.2d 828 (1979), Attorneys' fees to the prevailing party in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e)

et seq. have been allowed even for state administrative proceedings. Carey v. New York Gaslight Club, 598 F.2d 1253, 1259 (2d Cir. 1979).

b. Petitioners' Action Was Without Foundation.

(i) Law (Christiansberg).

In a civil rights claim, where the plaintiff has lost, an award may be granted to the defendant as the prevailing party where the action was ". . . without foundation, even though not brought in subjective bad faith, . . ." or where found that the action was ". . . frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansberg Garment Co. v. EEOC, 434 U.S. 412, 421, 422; 54 L. Ed. 2d 648, 657; 98 S. Ct. 694 (1978).

(ii) Record.

The summary judgment explains why the trial court made no findings

of fact and therefore made no finding of a lack of foundation.

A lack of foundation is implied by the fact that the trial court made a summary disposition of the case after the litigation had been going on for 26 months, during which this mass of claims could have been dropped.

The trial court further implied a finding of a lack of foundation by its statement, in its memorandum on its attorneys' fees award, that "I am inclined to believe that a denial thereof could well be determined an abuse of discretion." (Petit. App. A-42). With the authority of Christiansberg to guide it, the Washington State Court of Appeals approved the trial court award. It also approved an additional award for the appeal by relying on Washington Rule of Appellate Practice 18.1 as well as 42 U.S.C. §1988.

The strenuous defense made to this action does not imply that the claims had a foundation, since defendants/respondents were faced with a million dollars and more in claims against them (Petit., App. A-28-30).

The record shows that this is not one of those cases where some significant fact negating liability comes to light in the course of discovery proceedings, where at the start liability was indicated. The record here provides much information but no revelations.

For five years now, Petitioners have been pressing this litigation, losing on every point and at every step, continuing to litigate long after their action clearly was shown to be groundless. The accumulation of information about the case and the accumulated examination which has been made of this information tend to confirm the lack of foundation.

(iii) Atypical Economic Comparison Between the Parties.

In civil rights cases, courts are understandably reluctant to characterize a defendant as "prevailing" for a fee award where the only basis would be that the plaintiff simply has not won his suit. The prospect of having to pay the expenses of both sides may deter prospective plaintiffs from bringing a deserving suit. Such deterrent rests, in part, on the disproportionate economic comparison between the average plaintiff and the average defendant in a civil rights action.

But here, Petitioners are a real estate developer and his corporation, rather than an out-of-work schoolteacher or fireman who has been discharged or harassed out of a job. Petitioners own an island of about 25 acres (Lange Dep. 8). No evidence

was given as to value, but the land's annual taxes are $4,000 (Dep. 36), and Petitioners claim a loss in property values alone of $930,000 (Petit., App. A-13). By contrast, among the defendants here are a charitable corporation of modest size and several individuals, sued in their private capacities, who had to sustain the defense from their own pockets.

CONCLUSION

The diffuse and prolix Petition is difficult to meet responsively and informatively for this Court.

There seems to be no conflict of decisions affecting this case, which turns on its own facts. The record here does not show that the Washington Courts have decided any federal question of substance "not heretofore determined by this Court" or "in a way probably not in accord with applicable decisions of this Court." The Petition for Certiorari should be denied.

Dated: June 13, 1980.

Respectfully submitted,

RIDDELL, WILLIAMS, IVIE,
BULLITT & WALKINSHAW

By _____
of Attorneys for Respondents